



amended in part  
by Atty Gen OP. No  
88-14 (county  
home rule &  
KSA 19-211)

STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 164

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Re: Counties and County Officers--Powers and  
Duties--Sale of County Property; Conveying Real  
Property for Use as Federal Prison Site

Counties and County Officers--General  
Provisions--Home Rule Powers

Cities and Municipalities--General Provisions--  
Corporate Powers; Home Rule of Local Affairs and  
Government

Synopsis: Pursuant to sovereign power and the Bureau of  
Prisons Act, 18 U.S.C.S. §4001 et seq.,  
federal authorities may locate a federal  
correctional institution wherever the federal  
statutes authorize, provided constitutional  
procedures regarding takings are followed. A  
countywide election is not a required  
prerequisite to locating a federal correctional  
institute in the county, but a board of county  
commissioners may exercise home rule powers granted  
by K.S.A. 1986 Supp. 19-101a and hold an advisory  
election to determine public sentiment.

Pursuant to K.S.A. 12-101 Second, and K.S.A. 19-101 Second, county and city officials may purchase real estate for the beneficial use of the city or county if funds used for the purchase were levied for such purpose. Similarly, K.S.A. 12-101 Third and K.S.A. 19-101 Third allow the governing body of a city or county to convey real property provided the sale or disposal of the property is deemed conducive to the interests of the inhabitants of the city or county. K.S.A. 1986 Supp. 19-211 as amended limits the board of county commissioners' power to dispose of real property, but the 1985 amendment to this statute makes it non-uniformly applicable and therefore subject to home rule.

Pratt city or county officials may make a cash grant to the federal government provided such a grant serves a public purpose which benefits the inhabitants and the funds used for such a grant are not derived from levies or assessments made for other purposes. Cited herein: K.S.A. 12-101 Second, Third, 12-1201, 12-1740; 19-101 Second, Third; K.S.A. 1986 Supp. 19-101a; K.S.A. 19-101b, as amended by L. 1987, ch. 100, §1; K.S.A. 1986 Supp. 19-211, as amended by L. 1987, ch. 96, §1; 19-4101 et seq., 18 U.S.C. §4001 et seq.

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Dear Ms. Jorns and Mr. Stull:

As Pratt City and County Attorneys, you request our opinion on the legalities involved in locating a federal correctional institution within your area. Specifically you inquire the following: Whether a county-wide election by registered voters is required by either federal or state law before such an institution can be constructed in Pratt County, Kansas; whether the city of Pratt and the county of Pratt have the authority to purchase real property; whether the city and county of Pratt have the authority to convey real property to the Federal Bureau of Prisons as a site on which a federal correctional institution may be built; and whether the city or county of Pratt have the authority to make a cash grant, directly or indirectly, through a third party, towards the purchase of real property which will be donated to the Federal

Bureau of Prisons for a site on which the federal correctional institution is to be built. Each of your questions will be addressed separately.

The first question you present is whether a county-wide election by registered voters is required under federal or state law before a federal correctional institution (F.C.I.) can be located in Pratt county, Kansas.

The management of all federal prisons falls within the province of the executive branch of the United States government. Wheeler v. United States, C.A. Wash., 640 F.2d 1116 (1981). Establishment of such institutions by federal authorities is a sovereign power. Jones Hollow Ware Co., v. Crane, 106 A. 274 (Md. 1919). The Bureau of Prisons Act, 18 U.S.C.S. §4001 et seq. delegates this power to the United States Attorney General. This act authorizes the United States Attorney General to select a site either within or convenient to the state or judicial districts concerned and to erect a suitable facility at that site. State law cannot prohibit a valid exercise of this federal sovereign power. The only limitations on the exercise of this power appear to be common law. District of Columbia v. Totten, 5 F.2d 374, 379 (1925) states the common law rule governing the locating of such institutions: "The power delegated should be exercised with due respect to the rights of private property . . . and if the municipal corporation invades those rights, though it be acting under a general power derived from the Legislature, it should be made to respond in damages in like manner and to the same extent that an individual would be liable for a similar injury. . . ." Thus, federal authorities are free to locate a federal correctional institution without approval by local authorities or citizens, subject only to constitutional restrictions.

Although the sovereign powers of the federal government will in no way be affected, the board of county commissioners may authorize the holding of a purely advisory election at which the county electorate may express their views on the subject. By virtue of home rule powers granted in K.S.A. 1986 Supp. 19-101a, a board of county commissioners may hold an advisory election when the purpose of such an election is a public one and it is held independently of other statutorily authorized or required elections. The general rule of law requires a valid election pursuant to specific constitutional or statutory authority. An advisory election has no binding effect and it therefore is not dependent upon express

constitutional or statutory authority. See, e.g.,  
Attorney General Opinion No. 79-44.

Your second question is whether the city of Pratt and the  
county of Pratt have the authority to purchase real property.

K.S.A. 12-101 Second, states:

"Article 12, section 5 of the constitution  
of Kansas empowers cities to determine  
their local affairs and government by  
ordinance and enables the legislature to  
enact laws governing cities. Each city  
being a body corporate and politic, may  
among other powers --

. . . .

"Second. Purchase or receive, by  
bequest or gift, and hold, real and  
personal property for the use of the  
city." (Emphasis added.)

Similarly, K.S.A. 19-101 permits the county to purchase real  
estate for the use of the county.

County and city officials state their objective as the  
promotion of general welfare through increased economic  
prosperity. If the benefits from using this land are public  
benefits which flow to the city and county, the requirement  
that real property be purchased for the use of the city or  
county will probably be met.

What constitutes a public benefit depends upon many factors.  
Ordinarily a county or a municipal corporation may acquire  
land for necessary governmental purposes. 10 McQuillin  
Municipal Corporations 26 §28.12 (1950). A municipality may  
not engage in the business of dealing generally in real  
estate. Id. at 27. If the purpose of expenditure of public  
money is for a public purpose it is legitimate. Ullrich v.  
Board of County Commissioners of Thomas County, 234 Kan.  
782 (1984).

Attorney General Op. No. 80-19 discusses the use of public  
funds to aid a private purpose:

"[A] city may lawfully purchase real  
estate for the use of the city; however,

it is our opinion that the authority granted does not include the power to purchase real estate with the stated intention of making a gift of the real estate to a private enterprise."

Support for this conclusion is set out in 63 C.J.S. Municipal Corporations §958 (1950), which states:

"A municipality lacks power or authority to purchase or otherwise acquire or hold property for a purpose not within the powers specifically conferred on it or essential to carry out the objects of its creation, and it has been held that an ordinance appropriating property for a public purpose must set out the particular purpose so that the courts may judge as to whether or not it is a public purpose within the contemplation of the law. As a rule a municipal corporation cannot purchase property in aid of any private enterprise, however laudable its purpose or useful its encouragement." (Emphasis added.)

Pratt county and city officials propose to purchase real estate, and in some way divest themselves of that real estate, in order to persuade the federal government to locate a F.C.I. in that area. Whether this purchase and subsequent divestment serve a public or a private purpose is a question of fact, though certain statutes may be helpful in making this determination.

K.S.A. 19-4101 et seq. and K.S.A. 12-1740 provide statutory means by which counties and cities may promote economic prosperity by helping to finance certain new industries. In order to encourage new business, K.S.A. 12-1740 permits cities to issue revenue bonds to pay for all or a part of the costs of certain types of facilities:

"[T]he proceeds of which shall be used for the purpose of paying all or part of the cost of purchasing, acquiring, constructing, reconstructing, improving, equipping, furnishing, repairing, enlarging or remodeling facilities for agricultural, commercial, hospital,

industrial, natural resources,  
recreational development and manufacturing  
purposes and to enter into leases or  
lease-purchase agreements with any person,  
firm or corporation for such facilities."  
(Emphasis added.)

In spite of possible economic benefits to the area, it is questionable whether language in this statute permits the purchase and subsequent divestment of real estate for purposes of persuading the federal government to build a federal correctional institution. However, this statute recognizes that economic prosperity can be encouraged by providing employment opportunities, and diversification of industry.

K.S.A. 19-4101 et seq. allows the board of county commissioners to levy a tax and establish an economic development program. Funds collected under this program are used to promote the general economic welfare and prosperity of the area. K.S.A. 19-4102 allows the authorized tax levy to be put to a vote if 5% of the electors of the county sign a petition.

To our knowledge, no tax levy or issuance of revenue bonds has been proposed by Pratt city or county officials. We therefore assume these governing bodies do not intend to use these statutes as the basis for their expenditure of public funds. However, both statutes directly address promotion of the economic welfare of an area when businesses locate in a community. These statutes help define what a public benefit is and they manifest legislative approval of city and county attempts to attract new industries.

The city and county of Pratt may purchase real estate if the real estate is for the use of the city or county and if the funds used were not collected for other purposes. Absent specific prohibition, the governing body of a city or county necessarily determines what constitutes a public benefit for their locale.

The third issue presented deals with the authority of the city and county to convey real estate. K.S.A. 12-101 Third enables the legislative body of a city to "sell or convey any real or personal estate owned by the city, and make such order respecting the same as may be deemed conducive to the interests of the city, and to provide for the improvement, regulation and government of the same." Other than property described in K.S.A. 12-1201, the broad power granted to cities

to sell or convey appears to be limited only by its fiduciary duty to the city. Municipal corporations hold all property in a fiduciary capacity for the use and benefit of its citizens. 63 C.J.S. Municipal Corporations §950 (1950). Whether the disposal of a particular piece of property is conducive to the interests of the city and is a reasonable exercise of fiduciary power is a question of fact, not law. However, in determining the reasonableness of an action by a governing body, courts may not substitute their judgment for that of the governing body unless clearly compelled to do so by the evidence. Eastborough Corp. v. City of Eastborough, 210 Kan. 491 (1968). Whenever action taken is within authority statutorily granted, there is a presumption that the governing body acted reasonably. Id. at 495. Generally, courts will not control the discretion of a municipality in disposing of its property unless such discretion is manifestly abused. 10 McQuillan Municipal Corporation §28.40 110 (1950).

K.S.A. 19-101 Third provides that each organized county within the state shall be empowered to "sell and convey real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interests of the inhabitants." Thus, counties also are authorized to make conveyances for public purpose. Taken alone, this statutory authorization seems as broad as the power granted to cities in K.S.A. 12-101. However, K.S.A. 1986 Supp. 19-211, as amended by L. 1987, ch. 96, §1, specifically limits the power of the board of county commissioners to sell or dispose of property belonging to the county:

"(a) In any county other than Shawnee, Sedgwick and Johnson counties, except for any property belonging to a county law enforcement department, no property belonging to such county the value of which is more than \$25,000 but is not more than \$100,000, shall be sold or disposed of by any board of county commissioners without a unanimous vote of such commissioners and public notice of such sale or disposition containing the time, place and conditions thereof having been given at least once each week for three consecutive weeks prior thereto in the official newspaper of the county. Such sale shall be made to the highest bidder except that the board of county

commissioners shall have the right to reject any or all bids. No property, the value of which exceeds \$100,00, shall be sold or disposed of by any board of county commissioners, unless the proposition of sale or disposal of such property shall first be submitted to a vote of the electors of the county at a question submitted election called therefor, which election shall be called, noticed and held in the manner provided by K.S.A. 10-120, and amendments thereto, or at a general election."

The restrictions contained in K.S.A. 1986 Supp. 19-211 as amended apply any time property belonging to the county is sold or disposed of. Thus, the procedures must be followed not only when county property is sold, but also when it is pledged, given away or assigned.

County home rule powers granted in K.S.A. 1986 Supp. 19-101a authorize enactment of local legislation:

"(a) The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restriction or prohibitions: (1) Counties shall be subject to all acts of the legislature which apply uniformly to all counties. . . ." (Emphasis added.)

Pursuant to K.S.A. 19-101b, as amended by L. 1987, ch. 100, §1, counties may by charter resolution elect that the whole or any part of any non-uniform act of the legislature shall not apply to such county.

K.S.A. 19-211 was originally enacted in L. 1871, ch. 74, §7. Our review of this act indicates that until 1985 it did not contain the language referring to Shawnee, Sedgwick and Johnson counties. In our opinion, the new language in the 1985 amendment made the statute non-uniform. It is therefore subject to a charter resolution exempting a county from application of the provisions contained therein.

Thus, K.S.A. 12-101 Third and K.S.A. 19-101 Third allow governing bodies to convey county or city owned property. Limiting language contained in both statutes allow such a conveyance only when it is deemed conducive to the interests of the inhabitants. Whether such a conveyance is conducive is a question of fact. K.S.A. 1986 Supp. 19-211 limits the power of the board of county commissioners to convey real property. However, the 1985 amendment to this statute made it non-uniform in application and therefore susceptible to a charter resolution exempting a county from its provisions pursuant to K.S.A. 19-101b.

The fourth question submitted for an opinion concerns the authority of Pratt city or county officials to make cash grants, either directly or indirectly. Attorney General Opinion No. 84-116, citing Article 12, Section 5 of the Kansas Constitution, opined that a city without a medical treatment facility could adopt an ordinance granting public funds to a private nonprofit corporation for the establishment of a medical clinic. The opinion referred to Ulrich v. Board of Thomas County Commissioners, 234 Kan. 782 (1984) in which the Kansas Supreme Court allowed a grant of public funds where a public purpose was shown. Attorney General Opinion No. 87-52 examined the legalities involved in a city's grant of \$100,000 to a Fair Association. The opinion approved such a grant as long as economic benefits were expected to return to the city. The opinion stated that promotion of economic development in a community is clearly a local affair and the city could exercise its home rule power to make a grant to a non-profit corporation "provided such action does not run afoul of any constitutional limitations."

The federal government and its representatives, the Bureau of Prisons and the United States Attorney General, are not non-profit corporations. However neither operate for profit and the rationales in previous opinions apply in regard to the granting of public funds for public purposes.

If erection of a federal correctional institution serves a public purpose, thus benefiting the county and city inhabitants, officials of the city and county of Pratt may grant cash to the federal government so long as such a grant does not involve the use of funds derived from specific levies for purposes other than those for which the general fund is collected. Questions regarding the procedures in making such

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a grant and the degree to which officials may deplete general funds have not been presented and are therefore not addressed.

Very truly yours,



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